STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: August 31, 2021]

WILLIAM FELKNER	:	
	:	
v.	:	**C.A. No. PC-2007-6702**
	:	
RHODE ISLAND COLLEGE; **JOHN NAZARIAN**, individually and in his official capacity as President of Rhode Island College; **CAROL BENNETT-SPEIGHT**, individually and in her official capacity as Dean of the School of Social Work; **JAMES RYCZEK**, individually; **ROBERTA PEARLMUTTER,** individually and in her official capacity as Professor of Social Work; **and S. SCOTT MUELLER**, individually and in his official capacity as Assistant Professor of Social Work	:	

DECISION

McGUIRL, J. This action is on remand from the Rhode Island Supreme Court. *See Felkner v. Rhode Island College*, 203 A.3d 433, 460 (R.I. 2019).

I

Facts and Travel

A detailed summary of the factual allegations in the case is provided here, relating to the issue before the Court concerning Defendants' claim for qualified immunity. Plaintiff William Felkner (Plaintiff) enrolled in Defendant Rhode Island College's Masters of Social Work degree program in the fall of 2004. (Am. Compl. ¶ 13.) At the time, Rhode Island College was the only post-secondary institution in the state that offered a master's degree in social work. *Id.* ¶ 1. The School of Social Work designed the degree to be completed by a full-time student within two years. *Id.* ¶ 85. Plaintiff entered the program with the personal belief that market economies best

serve the interests of all members of society across socioeconomic boundaries, as opposed to government welfare programs. *Id.* ¶ 12. Rhode Island College describes the School of Social Work as dedicated to the core value of "social justice," in addition to other values.[1] (Defs.' Mem. 11-12.) Plaintiff would later describe his enrollment as "a great lesson in oppression" that caused him to "feel stronger in his convictions" than ever before. (Ex. 20, Part 3, at 2.) Plaintiff and the faculty of the School of Social Work began clashing during October of Plaintiff's first semester over the School-sponsored showing of Michael Moore's *Fahrenheit 9/11*. (Am. Compl. ¶ 16.) *See Felkner*, 203 A.3d at 440 n.5.

Plaintiff objected to the sponsored showing of the film via email to Defendant James Ryczek (Ryczek) and suggested also showing *FahrenHYPE 9/11* as a rebuttal. (Am. Compl. ¶ 16.) Ryczek responded the same day:

> "I don't think anyone here would want to quash alternative views. Again, as I have said in class . . . I want us to have an open discussion and debate about issues. In fact, questioning is an extremely important social work skill, and I know that I am doing a great deal of questioning with students about how they have traditionally thought about certain issues . . . and that is challenging for both me and the student.
>
> "Yet, if a student finds that they are consistently and regularly experiencing opposite views from what is being taught and espoused in the curriculum, or the professional 'norms' that keep coming up in class and in field, *then their fit with the profession will not get any*

[1] Black's Law Dictionary 1035 (11th ed. 2019) defines "social justice" as "1. Justice that conforms to a moral principle, such as that all people are equal. 2. One or more equitable resolutions sought on behalf of individuals and communities who are disenfranchised, underrepresented, or otherwise excluded from meaningful participation in legal, economic, cultural, and social structures, with the ultimate goal of removing barriers to participation and effecting social change."

Black's definition of the term also quotes classical liberal philosopher Friedrich A. Hayek: "'Social justice' can be given a meaning only in a directed or 'command' economy (such as an army) in which the individuals are ordered what to do; and any particular conception of 'social justice' could be realized only in such a centrally directed system." *Id.* (quoting 2 Friedrich A. Hayek, *Law, Legislation, and Liberty* 69 (1976)).

> *more comfortable, and in fact will most likely become increasingly uncomfortable.*
>
> "*I will be the first one to admit a bias toward a certain point of view*. But I don't characterize my 'bias' in this instance as a pejorative thing. In fact, I think the biases and predilections hold toward how I see the world and how it should be are why I am a social worker. *In the words of a colleague, I revel in my biases. So, I think anyone who consistently holds antithetical views to those that are espoused by the profession might ask themselves whether social work is the profession for them . . .* or similarly, *if one finds the views in the curriculum at RIC SSW antithetical to those they hold closely, then this particular school might not be a good fit for them. I don't want you to think that I am suggesting that you are such a person . . . but, then again, you may be . . . only you can make that determination*. It is not uncommon that the educational process here lends itself to such reflections on the part of many students.
>
> "Please, let me know if you want to talk further with me about these things." (Ex. 5 ¶ 9 (emphasis added)).

In addition to these statements to Plaintiff, at some point in Plaintiff's first semester, Ryczek advertised that the National Association of Social Workers, which many of the School of Social Work faculty members were involved in, was "working actively to defeat [then-President George W.] Bush." (Ex. 13 at 133:14-24.)

Plaintiff eventually learned that Professor Daniel Weisman sponsored the showing of *Fahrenheit 9/11*; Plaintiff similarly contacted Weisman about showing *FahrenHYPE 9/11* as a rebuttal. (Am. Compl. ¶ 19.) Professor Weisman responded thus on October 29, 2004:

> "Thank you for leaving me the film. I have followed through on my promise to contact the other professors whose classes saw Fahrenheit. I'm awaiting their responses. I want to correct a perception you seem to have: the SSW is not committed to balanced presentations, nor should we be. We are not a debating society; we are a values-based profession and we are responsible to promote the values that underlie social work. For the most part, Republican ideology is oppositional to the profession's fundamental values. Republican social workers face a challenge of how to reconcile the conflict. Most of the few I've met have figured out how to separate

> their personal and professional lives. I'm not sure how the others manage.
>
> "I've offered to show the film not because I'm open minded, but for two specific reasons: 1) I know what it's like to have minority views about things, and 2) like to stir up students to make them think. I do not share most of the analysis you offered in your note.
>
> "As for your assertion that showing this film is a chance to prove my intentions, it is not my intent to prove myself to you or anyone else. I made the offer because, for me, it was the reasonable thing to do." (Ex. 3.)

Professor Weisman did show *FahrenHYPE 9/11* to two of his classes, and Ryczek offered to show the film outside of class. (Ex. 5 ¶ 6.) Plaintiff thereafter created a now defunct website dedicated to critique the left-wing bias that he perceived as a School of Social Work student, in addition to utilizing other media platforms. (Second Am. Compl. ¶¶ 20-21.) Plaintiff published his email correspondence with Ryczek and Professor Weisman on his website, which caused Ryczek to cease communicating via email. *Id.* ¶ 23. Plaintiff also met with two additional professors in the School (who are not parties to this action) about the films, one of whom stated to Plaintiff that she hoped "all social workers are liberal." *Id.* ¶ 24.

During November 2004, Plaintiff communicated with Defendant John Nazarian (Nazarian) and Dr. Dan King, then Rhode Island College's Vice President for Academic Affairs and not a party here, over Plaintiff's issues with the School of Social Work faculty. *Id.* ¶¶ 26-27. These communications did not assuage Plaintiff's concerns. *Id.* On November 14, 2004, Plaintiff submitted the first of several articles to *The Providence Journal* about his experiences as a student. *Id.* ¶ 28. Plaintiff similarly spoke on two radio talk shows. *Id.* ¶ 29.

Plaintiff also experienced issues with Ryczek over his final assignment as a member of Ryczek's class during his first semester. (Am. Compl. ¶ 33.) Per Plaintiff, Ryczek assigned students to form groups to lobby the Rhode Island General Assembly for social welfare programs

from a specific list of topics approved by Ryczek. *Id.* However, in an affidavit, Ryczek contends that two group assignments existed: one to debate a social welfare issue; and a second to write a policy research paper "based on the perspective the student chose within her/his debate group." *See* Ex. 5 ¶ 19; *see also* Ex. 7. Per Ryczek, he provided a list of "'suggested' issues that were part of the 'One-RI Platform' . . . and other 'hot topic' issues that were coming up in the next legislative session." (Ex. 5 ¶ 20.) Ryczek stated that he "never characterized the list as exhaustive or 'approved' nor the only issues that could be chosen." *Id.* ¶ 21.

Regardless, Plaintiff felt that none of the topics dovetailed with his personal views, except for a proposed "Education and Training Amendment to the Family Independence Program," a temporary cash assistance program for Rhode Islanders experiencing financial issues. (Am. Compl. ¶ 36.) As part of the group project, Plaintiff discovered that two studies contradicted the research that the program utilized. *Id.* ¶¶ 37-39; Ex. 5 ¶ 37. Plaintiff approached Ryczek about these contradictory studies and requested to argue against the program, which Ryczek denied out of concerns of fairness and to allow Plaintiff an opportunity to learn how to advocate for a position that he did not agree with. (Am. Compl. ¶¶ 40-41; Ex. 5 ¶¶ 38-40.) According to Plaintiff, when denying his request to advocate against the program, Ryczek stated that "Rhode Island College 'is a perspective school and we teach that perspective'" and "'if you are going to lobby on [the program], you're going to lobby in our perspective.'" (Am. Compl. ¶ 42.)

Plaintiff wrote his paper against passage of the program, contrary to Ryczek's instructions, and received an "F" failing grade on both the paper and associated classroom debate. *Id.* ¶ 43; Ex. 5 ¶ 41.) Ryczek offered to allow Plaintiff to re-write the paper for a better, passing grade, but Plaintiff appealed the grade, which caused Ryczek to eventually enter a "C+" passing grade. (Am. Compl. ¶ 50; Ex. 5 ¶ 43.) As part of Plaintiff's appeal, the Rhode Island College Academic

Standing Committee conducted a hearing on January 20, 2005, at which Ryczek testified. (Am. Compl. ¶¶ 49, 51-52.) However, Plaintiff did not have an opportunity to question Ryczek, because Ryczek left the hearing after testifying as to his side of the narrative. *Id.*

While conducting research for his paper in December 2004, Plaintiff emailed Defendant Roberta Pearlmutter (Pearlmutter) regarding her research in favor of the cash assistance program. (Ex. 8 at 1.) Plaintiff's emails questioned the statistical grounds of Pearlmutter's research, to which Pearlmutter replied and explained. *Id.* at 1-3. Pearlmutter also replied that:

> "[S]ome of the questions you have asked require a knowledge and understanding of statistical and research techniques that other questions indicate you do not yet have. If you would care to discuss these issues further, I would prefer to do so in person. It is far too difficult to discuss them through e-mail when I cannot clarify or specifically respond to your questions in a way that assures your understanding of what I am talking about." *Id.* at 3.

Plaintiff attempted to refute Pearlmutter's explanation of her statistical model as being flawed, culminating in his statement to her that "[i]f you are confused by the limitations of descriptive studies or the value of those such as the mrdc [*sic*] report, *I might suggest you walk down to the psychology department and take a refresher course*[.]" *Id.* at 4 (emphasis added). Plaintiff also took issue with being characterized as lacking an understanding of the statistical issues, ultimately stating at the end of his email to Pearlmutter that he felt he was being discriminated against because he lived an hour away and the faculty were refusing to correspond via email. *Id.* at 4-5. Plaintiff later apologized for his remarks after being contacted about them by Professor Lenore Olsen, then-Chair of the Social Work Master's program. (Am. Compl. ¶¶ 44-45; Ex. 21 at 1; Ex. 22.)

Going into his second semester, Plaintiff contacted the Foundation for Individual Rights in Education (FIRE) about his situation; FIRE then corresponded with Nazarian. (Am. Compl. ¶ 57; Ex. 18 at 1.)

To complete an assignment as a student in Pearlmutter's class, Plaintiff desired to work on a lobbying and student organizing project related to an Academic Bill of Rights.[2] (Ex. 18 at 1.) However, Pearlmutter denied Plaintiff's request because she did not "see how [the project] fit" with her class's goal of positively and directly impacting "people who are in vulnerable populations" and advancing "social and economic justice." *Id.* Further, at the time, Rhode Island College had a Student Bill of Rights. (Am. Compl. ¶ 66.) Plaintiff then suggested the "governors [*sic*] welfare reform bill" as an alternative project, which Pearlmutter also did not accept.[3] (Ex. 18 at 3; Am. Compl. ¶ 67.)

Eventually, Plaintiff and Pearlmutter agreed that he could advocate against the cash assistance program legislation from his previous semester in a group consisting of himself, a Brown University student, and "a local radio personality." (Am. Compl. ¶¶ 68-69.) However, Pearlmutter deducted points from Plaintiff's presentation with these two non-Rhode Island College students during their final presentation because "Mr. Felkner did not have an authorized group." (Ex. 19 at 75:6-24.) Plaintiff also claims that he and his group members were ridiculed by

[2] Conservative activist and author David Horowitz promulgated the concept of an "Academic Bill of Rights" in 2004 "in response to a growing concern that modern university curricula have become overly political and ideological. Supporters of the Academic Bill of Rights cite studies revealing that most faculty members are members of the Democratic Party, profess doubts about the existence of God, and identify themselves as liberals." Michael P. Bobic, *Academic Bill of Rights*, The First Amendment Encyclopedia, https://www.mtsu.edu/first-amendment/article/855/academic-bill-of-rights (last visited Jul. 30, 2021).

However, organizations such as the American Association of University Professors describe the "Academic Bill of Rights" as "a grave threat to fundamental principles of academic freedom." American Association of University Professors, *Academic Bill of Rights*, Reports and Publications, https://www.aaup.org/report/academic-bill-rights (last visited Jul. 30, 2021).

[3] Page 4 of Exhibit 18 contains an editorial by Plaintiff regarding the conversation: "(note: in class when I mentioned the bill in class she described it as 'tearing apart what TANF has been able to do'. Why would any student join a group the professor has already publicly chastised?)[.]"

classmates for their beliefs, with Pearlmutter's permission, during their presentation. (Am. Compl. ¶ 82.)

Plaintiff thus began posting class discussions on his website. (Ex. 19 at 179:1-3.) Two students approached Pearlmutter about the postings and expressed concerns that Plaintiff would reveal students' names. *Id.* at 179:20-25. The two students felt that Plaintiff inhibited class discussions because he could post anything from class on his website. *Id.* The two students requested "the opportunity to talk about [the postings] in class," which Pearlmutter provided. *Id.* at 179:3-6. Plaintiff described Pearlmutter's "opportunity" for class discussion as being "a fifty-minute in-class discussion assailing [his] conservative views and his postings on his website. In particular, [Pearlmutter] stated "that the Academic Bill of Rights is bad for the curriculum and that the SSW only 'teaches from the progressive perspective.'" (Am. Compl. ¶ 72.)

Pearlmutter did not inform Plaintiff prior to class that this in-class discussion would occur because she thought that doing so was unnecessary; she testified in a deposition that "[i]t was intended to be a session where people talked about their feelings about what was going on in class and outside of class." (Ex. 19 at 184:3-13.) Students expressed various concerns that Plaintiff's website postings would harm their professional reputations, were incorrect and belittling, and generally made students uncomfortable. *Id.* at 186:1-23; 187:12-19. Per Plaintiff, he did not have the opportunity to respond to these concerns. (Am. Compl. ¶ 72.) Plaintiff then posted details about the class discussion on his website. *Id.* Plaintiff also emailed Defendant Carol Bennett-Speight (Bennett-Speight) regarding the discussion, but he did not receive a reply. *Id.* ¶ 74.

Plaintiff received a letter from the Academic Standing Committee on March 14, 2005, stating that the committee would conduct a hearing regarding ethics violations alleged against him by Pearlmutter for his emails to her, the recording of faculty, and the publication of in-class

discussions to his website. (Am. Compl. ¶¶ 73, 75.) Professor Lenore Olsen supported the charges against Plaintiff, and Ryczek also filed ethics charges. *Id.* ¶¶ 77-78. However, the committee dismissed Ryczek's charges as redundant. *Id.* ¶ 79. On April 27, 2005, the committee found that Plaintiff had not violated ethical codes regarding respect towards others and confidentiality; however, the committee did find him guilty of "'deception' for recording independent conversations with Defendant Pearlmutter." *Id.* ¶ 80. The committee required Plaintiff to sign an agreement to refrain from recording faculty members, which Plaintiff signed and agreed to do. *Id.* ¶¶ 80-81.

Toward the end of his first year, Plaintiff met with his faculty advisor to declare a concentration and develop a study plan, which required completion of a field placement. (Am. Compl. ¶ 86.) Plaintiff secured an internship within the office of then-Governor Donald L. Carcieri to specifically work on "welfare reform legislation" that would be submitted to the General Assembly. *Id.* Plaintiff and his advisor met with Ryczek, who was then the School of Social Work's Director of Field Placements. *Id.* ¶ 88. Plaintiff and Ryczek disagreed over whether he would have to complete seven out of the eleven total objectives required by the field placement, which would have required him to advocate for "progressive social change." *Id.* Ryczek refused to allow Plaintiff to forgo these objectives on the basis that "until there is a court case that says we need to do this, this is the law we are operating under." *Id.* ¶ 89.

After meeting with Bennett-Speight and receiving a new advisor, Defendant S. Scott Mueller (Mueller), Plaintiff eventually received his request for placement in October 2005, six months after his initial request. *Id.* ¶¶ 90-94. However, Mueller refused to allow Plaintiff to work on "welfare reform," which effectively gave Plaintiff the options of either abandoning his internship or conducting separate research outside of his field placement. *Id.* ¶¶ 94-95. Plaintiff

consequently worked on a healthcare reform project because he was weeks behind his classmates when Mueller finally approved the field placement. *Id.* ¶ 96. Plaintiff claims that Mueller neglected his duties as advisor because Mueller missed meetings and failed to respond to emails. *Id.* ¶ 97. Plaintiff again requested to work on welfare reform on November 30, 2005, which Mueller similarly refused to approve. *Id.* ¶ 98.

Plaintiff finished his classes necessary to graduate in May 2006. *Id.* ¶ 99. However, Plaintiff had not yet completed his field placement project, which precluded him from graduating with his classmates. *Id.* ¶¶ 99-100. Plaintiff met with Bennett-Speight and Dr. Dan King over his concerns; Dr. King approved Plaintiff's request to work on welfare reform and required Bennett-Speight to provide him an advisor. *Id.* ¶ 100. Plaintiff finally received permission to work on his field placement in January 2007, a year and a half after his classmates, and after his internship with Governor Carcieri's office had ended. *Id.* ¶ 101. Plaintiff requested additional time to complete his degree requirements but did not receive a response prior to this suit. *Id.* ¶ 102.

Plaintiff brought this action on December 14, 2007. *Id.* at 1. Plaintiff sued (1) Rhode Island College; (2) Nazarian, both individually and as President of Rhode Island College; (3) Scott Kane, both individually and as Dean of Students of Rhode Island College;[4] (4) Bennett-Speight, both individually and as Dean of the School of Social Work; (5) Ryczek, individually; (6) Pearlmutter, both individually and as a Professor of Social Work; and (7) Mueller, both individually and as an Assistant Professor of Social Work (collectively, excluding Kane, Defendants). (Compl. 1.) Plaintiff's Complaint alleged violations of his freedom of expression and right to equal protection under the First and Fourteenth Amendments to the United States Constitution; article I, sections

[4] Plaintiff and Defendant Kane settled; the Court (Hurst, J.) ordered a dismissal regarding Kane on November 7, 2008.

20 and 21 of the Rhode Island Constitution; 42 USC §§ 1983 and 1988; and the Rhode Island Civil Rights Act of 1990. (Compl. ¶¶ 26-31.)

In July 2008, Defendants filed a motion for summary judgment, arguing, *inter alia*, that the Complaint had set forth no actionable claims; Plaintiff had failed to exhaust his administrative remedies; the Court should abstain from reviewing Plaintiff's Complaint based upon the theory of academic abstention as set forth in *Curators of the University of Missouri v. Horowitz*, 435 US. 78 (1978); Plaintiff had suffered no cognizable harm; and Defendants were protected by qualified immunity. (Defs.' Mem. Supp. Mot. Summ. J (July 2, 2008) (MSJ 1).) The motion for summary judgment was heard and denied. *See* Order (Nov. 7, 2008) (Hurst, J.). Discovery then commenced.

Plaintiff filed an Amended Complaint on December 3, 2013, which added claims of procedural due process and conspiracy to violate civil rights under the Fourteenth Amendment to the United States Constitution; article I, section 2 of the Rhode Island Constitution; and 42 USC §§ 1983 and 1985(3). (Am. Compl. 25-33.)

On March 8, 2015, Defendants filed a renewed motion for summary judgment on grounds of qualified immunity, claiming that: (1) Plaintiff's claims regarded purely academic issues, such as grades and internship placements; and (2) Defendants did not deprive Plaintiff of any of his rights. (Mar. 8, 2015 Renewed Mot. Summ. J. (MSJ 2) 34-54.) On October 2, 2015, the Court (Vogel, J.) granted Defendants' motion for summary judgment, thus granting judgment in favor of Defendants on all counts of Plaintiff's Amended Complaint. *See* Decision 1; 46 (Oct. 2, 2015) (Vogel, J.). The Court (Vogel, J.) did not address whether Defendants were entitled to qualified immunity. *Id.* at 45 ("However, as Felkner failed to establish a genuine issue as to a material fact that a constitutional violation occurred, Defendants had no need to avail themselves of the protections of the qualified immunity doctrine[.]").

Thus, when Plaintiff appealed the grant of summary judgment to the Rhode Island Supreme Court on November 6, 2015, the Court in *Felkner* did not address whether Defendants would receive qualified immunity. *See Felkner*, 203 A.3d at 460. The Rhode Island Supreme Court remanded this action, in part, to determine "whether any of the defendants are entitled to qualified immunity, should defendants continue to press this argument[,]" which Defendants are doing in the present motion for summary judgment. *See id.*; *see also* Defs.' Post-Appeal Mem. Supp. Mot. Summ. J. (MSJ 3) (Oct. 31, 2019).

II

Standard of Review

Rule 56(c) of the Superior Court Rules of Civil Procedure provides that summary judgment shall issue if, after discovery, the evidence "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." Rhode Island courts review the evidence "in the light most favorable to the nonmoving party." *Felkner*, 203 A.3d at 446 (quotations omitted). "Furthermore, the nonmoving party bears the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions." *Id.* (quotations omitted). "Summary judgment should enter against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Id*. at 447 (brackets and quotations omitted). "It is a fundamental principle that summary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously." *Id.* (quotations omitted).

III

Parties' Arguments

Defendants argue that they are entitled to summary judgment based upon qualified immunity. (Defs.' Mem. 30.) Under qualified immunity analysis, Defendants argue (1) that the law at the time of the alleged constitutional violations by the Defendants against Plaintiff was not "clearly established"; and (2) even if the law was clearly established at the time, Defendants had no reasonable way of knowing that their actions violated Plaintiff's rights. *Id.* Therefore, Defendants request that the Court grant summary judgment in their favor on all claims because they are immune from being brought to trial. *Id.*

Plaintiff argues that the Court should deny summary judgment, contending that these Defendants are not eligible to receive qualified immunity. (Pl.'s Mem. 4.) Plaintiff cites to a wide variety of Rhode Island and Federal cases in support of his argument that the law was clearly established when he alleges that the Defendants violated his rights. *Id.* Plaintiff also argues that Defendants knew that they violated his rights. *Id.* at 51. Plaintiff finally argues that, because the record is "replete with disputed facts," this issue is precluded from resolution by summary judgment. *Id.* at 4. Therefore, Plaintiff requests the Court to deny summary judgment. *Id.* at 58.

IV

Analysis

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Garza v. Lansing School District*, 972 F.3d 853, 877 (6th Cir. 2020) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Rhode Island law recognizes the defense of qualified immunity for state actors. *See Fabrizio v. City of*

Providence, 104 A.3d 1289, 1294 (R.I. 2014). In a qualified immunity analysis, "'the first step in evaluating a claim . . . is to determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all.'" *Id.* (quoting *Monahan v. Girouard*, 911 A.2d 666, 674 (R.I. 2006)). The second step is to determine "'whether the right was clearly established at the time of the defendant's alleged violation.'" *See Baillargeon v. Drug Enforcement Administration*, 707 F. Supp. 2d 305, 307 (D.R.I. 2010) (quoting *Estrada v. Rhode Island*, 594 F.3d 56, 62-63 (1st Cir. 2010)). "'The second step has two aspects: (1) the clarity of the law at the time of the alleged civil rights violation and (2) whether, on the facts of the case, a reasonable defendant would have understood that his conduct violated the Plaintiffs' constitutional rights.'" *Id.* (quoting *Estrada*, 594 F.3d at 63). This two-step test for resolving government officials' qualified immunity claims was first set out by the Supreme Court of the United States in *Saucier v. Katz*, 533 U.S. 194 (2001). Courts deny qualified immunity when "[t]he contours of the right [. . . are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231. Qualified immunity applies to government officials in performing their duties, including the president, staff, and faculty of a university. *See Lallemand v. University of Rhode Island*, 9 F.3d 214, 217 (1st Cir. 1993) (finding that University of Rhode Island police lieutenant, president, and others received qualified immunity in a 42 USC § 1983 false arrest claim). *But see Hoggard v. Rhodes*, --- U.S. ---, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., in denying certiorari) ("But why should university officers, who have time to make calculated choices about enacting or

enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting? We have never offered a satisfactory explanation to this question").

A

First Prong: Allegation of Deprivation of Actual Constitutional Right

"'[T]he first step in evaluating a claim to qualified immunity is to determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all . . . .'" *Fabrizio*, 104 A.3d at 1294 (quoting *Monahan*, 911 A.2d at 674). In *Felkner*, the Rhode Island Supreme Court held that five issues presented material issues of fact and were precluded from resolution by summary judgment, including whether Defendants could receive qualified immunity. *Felkner*, 203 A.3d at 450, 462.

All parties agree that the holding of *Felkner* resolved the first prong of qualified immunity analysis. *See* MSJ 3 at 35 ("In this case, the Supreme Court, using the summary judgment standard, has already essentially determined the first prong of qualified immunity analysis -- that there are some colorable claims of constitutional violation[.]") (footnote omitted) (citing *Felkner*, 203 A.3d at 460, 462); *see also* Pl.'s Obj. at 33 ("The Rhode Island Supreme Court found there was material evidence that Defendants violated Plaintiff's freedom of expression, based on the undisputed facts[.]"). Thus, there is no dispute that Plaintiff satisfied the first prong of qualified immunity analysis, which is whether "the plaintiff has alleged the deprivation of an actual constitutional right." *See Fabrizio*, 104 A.3d at 1294.

B

Second Prong: Clearly Established Rights

1

The clarity of the law at the time of the alleged civil rights violation

The second prong of qualified immunity analysis requires "consider[ing] whether existing case law was clearly established so as to give the defendants fair warning that their conduct violated the plaintiff's constitutional rights." *Guillemard-Ginorio v. Contreras-Gómez*, 585 F.3d 508, 527 (1st Cir. 2009) (quotations omitted). "The law is considered clearly established either if courts have previously ruled that materially similar conduct was unconstitutional, or if a general constitutional rule already identified in the decisional law [applies] with obvious clarity to the specific conduct at issue." *Id.* (quotations omitted). "The inquiry requires [a court] to consider the state of the law at the time of the challenged act, or in other words 'conduct the judicial equivalent of an archeological dig.'" *Lopera v. Town of Coventry*, 652 F. Supp. 2d 203, 213 (D.R.I. 2009) (quoting *Savard v. Rhode Island*, 338 F.3d 23, 28 (1st Cir. 2003) (*en banc*) (affirmed by *Lopera v. Town of Coventry*, 640 F.3d 388, 404 (1st Cir. 2011)).

"If 'controlling authority' on the issue does not exist, a plaintiff may point to a 'consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'" *Id.* (quoting *Bergeron v. Cabral*, 560 F.3d 1, 11 (1st Cir. 2009)). "Careful attention also must be paid to the factual nuances of the case, so as to properly define the right at issue." *Id.* (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). "At bottom, 'the salient question is whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional.'" *Id.* (quoting *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009)).

Modern jurisprudence regarding academic freedom of educators and students in the classroom began with the overturning of *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).[5] Both cases involved schools' expulsion of students that belonged to the Jehovah's Witnesses faith. *Gobitis*, 310 U.S. at 591-92; *Barnette*, 319 U.S. at 630. In both cases, the expelled students refused to comply with mandated Pledges of Allegiance in school classrooms before the United States flag. *Gobitis*, 310 U.S. at 591; *Barnette*, 319 U.S. at 627. Prior to and during the Second World War, states enacted laws that compelled students to pledge allegiance to the United States flag to instill nationalistic sentiments of unity and citizenship. *See* Laura Prieston, *Parents, Students, and the Pledge of Allegiance: Why Courts Must Protect the Marketplace of Student Ideas*, 52 B.C. L. Rev. 375, 379 (2011). Those of the Jehovah's Witnesses faith opposed compulsory pledges on Biblical and political grounds:[6]

> "Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them. They consider that the flag is an 'image' within this command. For this reason they refuse to salute it.'" *Barnette*, 319 U.S. at 629.

[5] Defendants argue that the doctrines of academic freedom and abstention preclude this suit. (Answer Am. Compl. ¶ 26; p. 24.)

[6] Jehovah's Witnesses also opposed the Pledge of Allegiance because of Nazi Germany's comparable and contemporaneous requirement for school children in the Third Reich to salute and pledge to Nazi flags. *See* Jane G. Rainey, *Jehovah's Witnesses*, The First Amendment Encyclopedia https://www.mtsu.edu/first-amendment/article/1366/jehovah-s-witnesses (last visited Jul. 30, 2021). At the time, both the American Pledge of Allegiance, now known as the "Bellamy Pledge," and the "Nazi salute," involved raising the right hand to eye level towards the flag. *Id.* Jehovah's Witnesses in the Third Reich refused to comply with the Nazi requirement and were severely punished; American Witnesses responded by similarly refusing to comply as a demonstration of solidarity with their brethren under Nazi oppression. *Id.*

In overturning the holding of *Gobitis*, which affirmed a Pennsylvania statute that required the Pledge of Allegiance in schools on grounds of deference to state legislative authority, the court in *Barnette* reasoned that such statutes forced students to conform to a specific political and religious belief, contrary to those held by the Jehovah's Witnesses, against the intent and spirit of the First Amendment to the United States Constitution. *Gobitis*, 310 U.S. at 600; *Barnette*, 319 U.S. 641-42. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *Barnette*, 319 U.S. at 642. Thus, the Supreme Court in *Barnette* explicitly overruled the holding in *Gobitis* that schools could compel students to pledge allegiance to the American flag. *Id.*

Over time, the Supreme Court of the United States has defined the boundaries of First Amendment rights in academia for students, educators, and administrators. *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969) (finding that school could not preclude students from wearing black armbands in class to demonstrate against the Vietnam War); *see also Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (finding that schools may restrict students' First Amendment rights by exercising editorial power "so long as [the school's] actions are reasonably related to legitimate pedagogical concerns"); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682-83 (1986) (under Federal law, "the First Amendment gives a high school student the classroom right to wear *Tinker*'s armband, but not *Cohen*'s jacket"; *i.e.*, students have free speech rights, provided such speech does not venture into the lewd, obscene, or disruptive) (quoting *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043, 1057 (2d Cir. 1979)); *Regents of University of Michigan v. Ewing*,

474 U.S. 214, 227-28 (1985) (reversing and remanding a precluded claim by an academically-dismissed medical school applicant who argued that he had a contractual, property, and liberty interest in being allowed to retake a critical exam); *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 89-90 (1978) (deferring to findings of professors and teachers on academic issues, such as what grade to award a student); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 574-75 (1972) (finding that adjunct professor with annual contract did not have a property right in future employment and failed to show that his contract was not renewed because of his exercise of free speech); *Healy v. James*, 408 U.S. 169, 189-90 (1972) (finding that a college president was precluded on First Amendment grounds from denying a student group's approval without evidence that the group would be disruptive); *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563, 574-75 (1968) (finding that a school district was precluded from terminating a teacher based on teacher's exercise of free speech, absent showing that the teacher made knowingly or recklessly false statements); *Keyishian v. Board of Regents of University of State of New York*, 385 U.S. 589, 603-04 (1967) (abrogating a statutory scheme regarding what professors at state universities could express because of the statutes' "extraordinary ambiguity"). The most relevant of these are *Horowitz*, 435 U.S. at 89-91; *Ewing*, 474 U.S. at 227-28; and *Fraser*, 478 U.S. at 682-83.

The facts of both *Horowitz* and *Ewing* involved appeals by academically dismissed medical students at public institutions. In *Horowitz*, the plaintiff, a University of Missouri-Kansas City Medical School student, had "'performance [in her program that] was below that of her peers in all clinical patient-oriented settings,' . . . she was erratic in her attendance at clinical sessions, and . . . she lacked a critical concern for personal hygiene." *Horowitz*, 435 U.S. at 81. After further unsatisfactory evaluations, the school's council on evaluations recommended dropping the

plaintiff from the school. *Id.* at 82. Likewise, in *Ewing*, the plaintiff, a University of Michigan student, entered a six-year combined undergraduate and medical program, but immediately began experiencing academic difficulties, such as receiving marginally passing (C's and D's), incomplete, and failing grades. *Ewing*, 474 U.S. at 217 n.4. After the plaintiff appealed a failed entrance exam that would have allowed the transition from the undergraduate program into the medical program, the medical school's executive committee denied the student's request to retake the exam, precluding his continued studies. *Id.* at 216.

In both *Horowitz* and *Ewing*, the Court held that because the medical schools dismissed the students for academic, rather than disciplinary, reasons, courts should not intrude into academic matters by requiring a hearing before dismissal, and instead should defer to the expertise of educators. *See Horowitz*, 435 U.S. at 89-91; *Ewing*, 474 U.S. at 225-27. Both cases described that courts generally avoid intruding into academic disputes between educators and students, but are more proactive in resolving disputes regarding student discipline, because "[a]cademic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings [of disciplinary proceedings]." *Horowitz*, 435 U.S. at 89. "When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment." *Ewing*, 474 U.S. at 225 (citing *Horowitz*, 435 U.S. at 98 n.6 ("University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation[.]")). "Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Horowitz*, 435 U.S. at 90.

In contrast to *Horowitz* and *Ewing*, *Fraser* involved disciplining of a high school student over what he said during a speech at a school assembly. *See Fraser*, 478 U.S. at 676. "During the entire speech, [the student] referred to [a classmate] in terms of an elaborate, graphic, and explicit sexual metaphor." *Id.* "Some of the students at the assembly hooted and yelled during the speech, some mimicked the sexual activities alluded to in the speech, and others appeared to be bewildered and embarrassed." *Id.* "After [the student] admitted that he deliberately used sexual innuendo in the speech, he was informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises." *Id.* The court in *Fraser* held that, while students do have a First Amendment right to freely express themselves in school, their expressions must conform to avoid "offensively lewd and indecent" or otherwise disruptive forms. *Id.* at 682-85. The court in *Fraser* reasoned that the school had acted properly in disciplining the student because of the disruptive and lewd nature of the speech. *Id.* at 685-86.

Here, many of the incidents alleged in the Amended Complaint between Plaintiff and Defendants are academic in nature, including the issues of Plaintiff's assignments in his classes with Defendants Ryczek and Pearlmutter and whether Plaintiff could intern at Governor Carcieri's office to work on "welfare reform[.]" These issues, it is suggested, are comparable to those issues present in *Horowitz*, 435 U.S. at 89-91 and *Ewing*, 474 U.S. at 225-27. Indeed, the crux of the issue that Plaintiff experienced with Ryczek, Pearlmutter, and Mueller involved: (1) what Plaintiff's assignments would entail; and (2) Plaintiff's grades for those assignments. *See Horowitz*, 435 U.S. at 89-90 (courts are ill-equipped to resolve issues such as whether to dismiss a student for academic failure or how to grade the student's work by means employed by academics: expert evaluation of cumulative information not presented in an adversarial manner).

The Court (Vogel, J.) noted this in the previous grant of summary judgment. *See* Decision at 34 ("[C]ourts should defer to decisions by school officials unless a plaintiff can show that the academic decision 'is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.'" (citing *Horowitz*, 435 U.S. at 90). Rhode Island Supreme Court Associate Justice William P. Robinson, III similarly noted this sentiment in his concurrence and dissent on appeal. *See Felkner*, 203 A.3d at 462-63 (Robinson, J., concurring in part and dissenting in part).

In fact, the only disciplinary incident in the present case involved the ethics charges brought against Plaintiff during his second semester. (Am. Compl. ¶ 75.) The one charge out of the three brought that the ethics committee found Plaintiff guilty of violating regarded "deception" in his recordings of independent conversations with Pearlmutter. (Am. Compl. ¶ 80.) The "deception" charge involved Plaintiff's comment that Pearlmutter "take a refresher course" at Rhode Island College's psychology department, his attempts to work on the Academic Bill of Rights, his website postings, and his recording of a conversation between Pearlmutter and himself on February 17, 2005. (Am. Compl. ¶ 73.) Plaintiff agreed to stop making these recordings of Pearlmutter. (Am. Compl. ¶ 81.) Plaintiff does not challenge the findings of that disciplinary hearing. (Am. Compl. ¶¶ 140-150.)

Further, Plaintiff's recording, posting, and editorializing of class discussions disrupted class. *Id.* ¶ 72. Two students voiced concerns to Pearlmutter regarding Plaintiff's recordings, stating that they found his postings belittling, uncomfortable, incorrect, and damaging to their future professional careers. Ex. 19 at 186:1-24; 187:12-19. These concerns resulted in, per Plaintiff, "a fifty-minute in-class discussion assailing [his] conservative views and his postings on his website." (Am. Compl. ¶ 72.) These facts demonstrate that, like the lewd speech in *Fraser* that

resulted in class discussions to deal with the speech's fallout, not to mention the disruption caused by the speech itself, Plaintiff's recording, posting, and editorializing was disruptive to Pearlmutter's class. *See Fraser*, 478 U.S. at 675; 685-86.

The parties also cite a recent Eighth Circuit Court of Appeals decision, *Intervarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021) (*Intervarsity*) in support of their arguments. The court in *Intervarsity* held that the University of Iowa singled out and discriminated against a Christian student group by denying it registration as a student group because the university specifically targeted the group for not allowing all students to join, rather than allowing the group to receive an exemption from the university as other non-inclusive student groups received. *See Intervarsity*, 5 F.4th at 866-67. Thus, the court in *Intervarsity* affirmed the denial of qualified immunity to the University of Iowa because the university violated extant Supreme Court of the United States and circuit court case law. *Id.* at 867.

However, the holding of *Intervarsity* is inapplicable here because, as stated *supra*, Plaintiff's activities interrupted classroom activities. (Am. Compl. ¶ 72.) Plaintiff had to be disciplined over his comments to Pearlmutter, which he did not challenge, and his website postings made his classmates uncomfortable to the point of requiring Pearlmutter to address the issue in class for fifty minutes. *Id.* ¶¶ 72-73; ¶¶ 80-81; Ex. 19 at 186:1-24; 187:12-19. As stated by the Court in *Fraser*, "Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences." *Fraser*, 478 U.S. at 681. Thus, the holding of *Intervarsity* does not apply because Plaintiff disrupted classroom activities and had to be disciplined over comments he made to Pearlmutter, in contrast to the student group in *Intervarsity* that was arbitrarily singled out for being a Christian group, in contrast to other non-inclusive groups that received exemptions.

Justice Robinson's concurrence and dissent in *Felkner*, 203 A.3d at 462 n.2 also touched on the legal maxim "*de minimis non curat lex*," translated as "The law does not concern itself with trifles." *See* Black's Law Dictionary 544 (11th ed. 2019) (defining "*de minimus non curat lex*"). "The maxim . . . retains force even in constitutional cases, even in civil rights cases." *See Swick v. City of Chicago*, 11 F.3d 85, 87 (7th Cir. 1993) (affirming placing a police officer on involuntary sick leave after the officer suffered "alleged psychological problems" because of the triviality and potential slippery slope of the suit). "Its particular function is to place outside the scope of legal relief the sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society rather than made a . . . case out of." *Id.*

As stated *supra*, the nexus of Plaintiff's claims surrounds his argument that two professors did not allow him to complete master's level assignments on topics he wanted, such as not being allowed to lobby against the cash assistance program or in favor of the Academic Bill of Rights, and that he could not intern for Governor Carcieri. These damages, comparable in their intangibility to being forced onto sick leave as in *Swick*, are not of the kind intended to be resolved by the Court. *See Swick*, 11 F.3d at 87; *see also Horowitz*, 435 U.S. at 92 ("Courts are particularly ill-equipped to evaluate academic performance"). To paraphrase the court in *Swick*, the consequences of allowing disputes over grades and internships to be resolved by courts are that the courts would become academic overseers, a role for which courts are not designed or intended. *See id.*; *see also Horowitz*, 435 U.S. at 90.

Thus, it does not appear from the landscape of caselaw involving academic decisions by public institutions, including *Horowitz*, *Ewing*, and *Fraser*, in addition to *Swick*, that the actions undertaken by Defendants in this case had been clearly established as violations of a student's constitutional rights between the fall of 2004 and early 2007. Indeed, to the contrary, the law at

the time of Plaintiff's claim, including *Horowitz*, *Ewing*, *Fraser*, and *Swick*, clearly established that his suit was precluded from being brought, considering that his lawsuit concerns intangible academic matters, such as grades and internship and project approvals. *See Shaboon v. Duncan*, 252 F.3d 722, 731 (5th Cir. 2001) (affirming dismissal of a medical student for her inability to work with patients as an academic dismissal and thus, qualified immunity applied under the reasoning of *Horowitz*); *see also Perez v. Texas A & M University at Corpus Christi*, 589 F. App'x 244, 248-49 (5th Cir. 2014) (affirming dismissal of a medical student for failing an exam twice under *Horowitz* and qualified immunity). Therefore, the first part of the second prong of the test for qualified immunity has not been satisfied here, in that "existing case law" was not "clearly established to give the Defendants fair warning that their conduct violated the plaintiff's constitutional rights." *See Saucier*, 533 U.S. at 201.

2

Whether, on the facts of the case, a reasonable defendant would have understood that his conduct violated the Plaintiff's constitutional rights

The second prong of qualified immunity analysis also considers whether a reasonable defendant would have understood that his conduct violated a plaintiff's constitutional rights. *See Feminist Majority Foundation v. Hurley*, 911 F.3d 674, 704-05 (4th Cir. 2018) (holding that a university president would not have known that student-on-student sexual harassment constituted a violation of the victim's rights, in contrast to an employee sexually harassing a student). "Courts have described the second prong many ways, but 'a right is clearly established if the contours of the right were sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 722 (brackets omitted) (quoting *Cox v. Quinn*, 828 F.3d 227, 238 (4th Cir. 2016)). "Put differently, for the law to be clearly established, officials must have 'fair notice' that their conduct violated the plaintiff's constitutional right." *Id.* (citing *Hope v. Pelzer*, 536 U.S.

730, 739-41 (2002)). If the Court determines, as suggested above, that the law at the time of the alleged violations did not clearly establish a violation of Plaintiff's rights, Defendants could not have reasonably known that their conduct was violating Plaintiff's constitutional rights; nevertheless, an analysis of that second part is provided here.

In *Hurley*, the court held that the plaintiffs sufficiently alleged that a university president failed to curb sexual harassment among the student body, satisfying the first prong of qualified immunity analysis, but that the president did not have "fair warning" based on existent case law at the time of the constitutional violations to satisfy the second prong. *Hurley*, 911 F.3d at 703-04. The plaintiffs in *Hurley* based their legal argument on *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 257-58 (2009) and *Jennings v. University of North Carolina*, 482 F.3d 686, 701-02 (4th Cir. 2007). *Id.* at 704-05. The court in *Hurley* differentiated the plaintiff's cited cases on two grounds: first, the court in *Fitzgerald* did not define the applicable standard for an equal protection claim based on deliberate indifference and thus was not clear enough case law for the president to know his actions to be constitutional violations; and second, the holding of *Jennings* applied to sexual harassment by university employees against students, not student-on-student harassment. *Id.* Using this reasoning, that the case law was not yet clear enough to directly deal with the constitutional violations at issue, the Fourth Circuit Court of Appeals in *Hurley* found that the plaintiff's argument failed on the second prong of qualified immunity analysis. *Id.*

Several factors indicate that Plaintiff intended to sue Rhode Island College, even prior to his enrollment in Rhode Island College's School of Social Work, which would have suggested the probability of litigation to Defendants. First, Plaintiff stated that he had "similar testimony dating back to the 1980's" of a perceived left-wing bias at the School of Social Work. (Ex. 20, Part 6.)

Second, Plaintiff generally preferred all conversations with professors to be conducted via email, as demonstrated by this example from his email chain to Pearlmutter:

> "I look forward to your reply; I prefer to do it via email as not to misinterpret you [*sic*] words. (not to mention we are 1 hour away and schedules as they are make personal visits inconvenient, that's why I offered for you to come here) *As long as we are all speaking the truth and being ethical there should not be problem with email communication*.
>
> "I have already been told by RIC SSW faculty member that he will not correspond to me via email. *There are some people interested in academic freedoms that are concerned by that practice, as am I*. Limiting my access in a disproportionate way (compared to other students) puts me at a disadvantage in regard to access to education. Perhaps this faculty does not correspond with any students via email (that is yet to be determined); if that's the case then fine, we are all on the same playing field. *If not then I am being discriminated upon and that will be dealt with according* [*sic*]. Is discrimination something you are concerned about, and would you be willing to advocate for non-discriminatory practices? *Please do not put yourself in that same predicament*. I have put my home email in the cc, so please 'reply to all.'" Ex. 8 at 5 (emphases added).

Plaintiff posted his email conversations, such as the one quoted *supra*, on his website. *See* Ex. 20, Part 5, 1-7. Plaintiff also demanded from a professor "that all [his work] [on Plaintiff's healthcare reform project] be conducted via email." (Ex. 30 ¶ 30.) Third, Plaintiff's website postings included significant editorializing of his conversations between himself and his professors. *See* Ex. 18; Ex. 20, Part 7, at 20-22. For example, Plaintiff editorialized one conversation with Pearlmutter in the following way:

> "P[earlmutter]- NO ITS NOT (loud & mad) we are talking about social justice for POOR people (very mad) (again confirmation that she believes any views taught besides the ones she promotes cannot help the poor & oppressed. This makes me think when my first policy professor said "Republicans are not mean, they just think they are right". Here she shows that liberals/progressives are not arrogant, they just think everyone else is wrong. This closed-minded view is why we have such division in our country. When one side

> refuses to acknowledge ANY good in the other side, we are doomed to conflict)[.]" (Ex. 20, Part 7, at 21.)

Plaintiff's editorializing of his conversations with his professors and his fellow students' class comments culminated in the in-class discussion regarding his website after his classmates expressed to Pearlmutter their lack of comfort with Plaintiff's posting on his website, which his classmates found belittling and incorrect. (Ex. 19 at 186:1-24; 187:12-19; Am. Compl. ¶¶ 72-74.) Plaintiff likewise demonstrated a tendency to misconstrue communications in dealing with Ryczek, who stated that "[Plaintiff] has heard certain things that I have said differently than I have said them." (Ex. 13 at 175:13-21.) Fourth, Plaintiff mocked and/or parodied the social work profession during his presentation as part of his final assignment in Ryczek's class. (Ex. 11 at 2.) Ryczek's evaluation stated that "[Plaintiff . . .] did not appropriately participate in the debate presentation." *Id.* Plaintiff did make a presentation against his group's assignment, contrary to the rest of his group, which Ryczek summarized:

- Plaintiff appeared as a social worker "with a rumpled shirt, tousled hair, upturned collar sport jacket, and undone tie."
- Plaintiff had no research to support his client's (a group member's) perspective, but stated that he supported his client's right to self-determination.
- Plaintiff cited a Manpower Research Demonstration Corporation study that, when taken out of context, supported his argument against his group, and ended with "Oh, I'm sorry[,] I guess that doesn't support our view."
- Plaintiff stated during his presentation, "Wouldn't you like your education paid for?", which Ryczek interpreted as having a "negative connotation." *Id.*

Ryczek informed Plaintiff that "[these] actions are unprofessional and inconsistent with . . . appropriate social work practice" and that Plaintiff's "work for [the] debate presentation assignment was not acceptable." *Id.* at 4. Plaintiff similarly displayed poor effort in completing his

healthcare reform project, with little to no progress being made on it. (Ex. 30 ¶¶ 21-48.) Fifth, Plaintiff throughout his time at the School of Social Work emphasized that he was being oppressed, discriminated against, and threatened. (Ex. 20, Part 6, at 29.)[7] One email from Plaintiff to Professor Frederick Reamer contained only two sentences: "Are you threatening me? Another example of the oppression[.]" *Id.* The overall tone of Plaintiff's communications with his professors seemed to be fixated on concepts such as oppression, indoctrination, and chastisement. (Ex. 18 at 4; Ex. 20.) Professor Weisman described to *The Providence Journal* that "[i]n [his] experience, . . . [Plaintiff was] looking for fights and [Plaintiff was] finding them." (Ex. 20, Part 6, at 13.) Finally, Plaintiff's website demonstrates that Plaintiff sought litigation, explicitly challenging Nazarian to "please sue." *See* Ex. 20, Part 6, at 1. These facts strongly suggest that Defendants would have known that Plaintiff sought to litigate against them over what Plaintiff perceived as a left-wing bias in the School of Social Work.[8]

The record suggests that Ryczek could not have known that his actions would constitute a deprivation of Plaintiff's rights. *See* Ex. 13; Ex. 15; Ex. 18. For example, Ryczek began taking notes regarding his interactions with Plaintiff. (Ex. 13 at 13:15-25.) Ryczek never took similar notes regarding other students at Rhode Island College. *Id.* at 14:1-5. Ryczek also redacted parts of his notes after consulting with the then-general counsel of Rhode Island College when Plaintiff refused to perform all the required objectives for field placement. *Id.* at 14:24-15:8; 17:6-12. In addition to Rhode Island College's general counsel, Ryczek spoke to a faculty member at another institution who possessed both a Master of Social Work and Juris Doctor degree. *Id.* at 15:9-18.

[7] This page is listed as number "5101" in the footer.

[8] The Court in *Felkner* noted that Plaintiff "was no doubt a challenging student with a political agenda as robust as the agenda he ascribes to defendants[,]" causing Ryczek, an adjunct professor, to refuse to teach Plaintiff for a second semester because "dealing with [Plaintiff] required too much of [Ryczek's] time." *See Felkner*, 203 A.3d at 442, 449.

Ryczek characterized the advice he sought as "looking for some direction and guidance on how to work with student who didn't want to do the objectives in field." *Id.* at 17:9-12. Ryczek testified that his colleagues, specifically Bennett-Speight and Professor Lenore Olsen, affirmed his actions and interactions with Plaintiff. *Id.* at 114:12-115:15. Ryczek contacted these two colleagues at the School of Social Work when Ryczek "felt that there was an issue that might become bigger than a student was expressing." *Id.* at 159:3-13. It seems that these facts, that Ryczek acted on the advice of two of his colleagues and potentially two legal advisors in an attempt to seek guidance as to how to manage a difficult student in an academic setting, indicate that Ryczek was taking care in properly discharging his duties as an adjunct professor, and tend to disprove any assertion that Ryczek could have known or had "fair warning" that he violated Plaintiff's rights.

At the time, as stated previously, case law such as *Horowitz*, 435 U.S. at 89-91; *Ewing*, 474 U.S. at 227-28; and *Fraser*, 478 U.S. at 675 held that professors did not violate the rights of students by making decisions regarding grading, absent some animus, and, as stated *supra*, Ryczek acted on the advice of his colleagues and two legal advisers. The record does not demonstrate a showing of an animus against Plaintiff; for example, Ryczek claims to have denied Plaintiff's request to change his first semester assignment topic out of concerns of fairness and to allow Plaintiff the opportunity to learn how to advocate for a position that he did not personally agree with. (Am. Compl. ¶¶ 40-41; Ex. 5 ¶¶ 38-40.) *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004) (suggesting the existence of an animus by theater program professors towards the plaintiff's Mormon religion by suggesting that the plaintiff talk to "other 'good Mormon girls'" when the plaintiff expressed reservations about saying the word "fuck" as a student-actor because of her religiosity). If there is an indication of bias, the record indicates that Plaintiff had one against Rhode Island College, explicitly asking to be sued on his website. *See* Ex. 20, Part 7. The record

indicates that Ryczek's handling of Plaintiff's assignment requests and grades, Plaintiff's conflict with Pearlmutter regarding the Academic Bill of Rights assignment, and Plaintiff's request to intern for Governor Carcieri, clearly come within the purview of academic decisions that courts defer to. *See Horowitz*, 435 U.S. at 89-91.

Therefore, Plaintiff failed to satisfy the second prong of qualified immunity analysis because "existing case law" was not "clearly established so as to give Defendants fair warning that their conduct violated the Plaintiff's constitutional rights" when Plaintiff was enrolled at Rhode Island College from the fall of 2004 through January 2007, and because a reasonable defendant would not have understood that his conduct violated Plaintiff's constitutional rights under the facts here and under relevant caselaw. *See Saucier*, 533 U.S. at 201. Plaintiff's claims fall within an academic area that courts are ill-equipped to delve into, such as the grading of students' work. Thus, summary judgment must issue based upon qualified immunity.

V

Conclusion

The Court, therefore, grants Defendants' Motion for Summary Judgment because existing case law clearly established that academic disputes are within the realm of academic freedom and discretion. Thus, Defendants are entitled to qualified immunity under the facts of this case. Counsel shall prepare the appropriate order.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**William Felkner v. Rhode Island College, et al.**
CASE NO:	**PC-2007-6702**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 31, 2021**
JUSTICE/MAGISTRATE:	**McGuirl, J.**
ATTORNEYS:	
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